IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-1693

STANLEY BLACKLEDGE, Warden, Central Prison, and STATE OF NORTH CAROLINA,

Petitioners

v.

GARY DARRELL ALLISON,

Respondent

ON PETITION FOR CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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ARGUMENT

I. THERE IS NO CONFLICT IN THE CIRCUITS OVER THE ISSUES INVOLVED IN THIS CASE.

Petitioners' claim of a conflict among the circuits is apparently based on the dissent by Judge Field in the Court below, for petitioners cite as authority that the "files and records" are conclusive the same four cases - and only those cases - cited by Judge Field in his footnote. Appendix E to Petition at 28 n 2. These cases do not demonstrate a present split in the circuits for several reasons. First of all, Judge

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Field cited them solely to illustrate that Walters v. Harris, 460 F.2d 988 (4th Cir. 1972), at the time it was decided, placed the Fourth Circuit in conflict, in Judge Field's opinion, with four other circuits. However, Walters was decided in 1972, prior to this Court's decision in Fontaine v. United States, 411 U.S. 213 (1973), and Santobello v. New York, 404 U.S. 257 (1971). And each of the four cases cited by Judge Field, of course, also were decided prior to those two decisions.

Furthermore, Walters was a federal case involving Rule 11, as were each of the cases cited by petitioners. The present case, however, involves a claim by a prisoner in state custody arising out of his state court trial. If indeed there is a conflict among the circuits with respect to the effect to be given Rule 11 in a subsequent habeas corpus claim, the appropriate vehicle for resolving such a conflict would be a federal prisoner's appeal, not this one.

Finally, at least some of the circuits cited by petitioners as following the rule that the files and records are conclusive no longer adhere to that position. This is not surprising in view of the fact, as has been stated, that all are pre-Santobello and pre-Fontaine cases. For instance, Norman v. United States, 368 F.2d 645 (3d Cir. 1966), cited by petitioners, held that no hearing was required where the record revealed a particularly searching examination of defendant by the court as to his understanding and the voluntariness of his plea, and the absence of any allegation that his lawyer's assurances of a one-year sentence were supposedly backed by any assurances from the government or the court. Norman was followed by Moorhead v. United States, 456 F.2d 992 (3d Cir. 1972), and United States v. Hawthorne, 502 F.2d 1183 (3d Cir. 1974), both of which held that a hearing was required where the defendant claimed that his attorney had represented that there existed a pre-arranged agreement as to the sentence he would receive. Thus it is not exactly accurate to place the Third Circuit in the petitioners' so-called "conclusive" category.

Neither does the Fifth Circuit properly belong in that category. Pursley v. United States 391 F.29 224 (5th Cir. 1968), cited by petitioner, was followed by several cases holding that a defendant was not estopped to assert a broken plea bargain by his answers to the court's questions during the sentencing proceeding. See,e.g.,Gallegos v. Untied States, 466 F.2d 740 (5th Cir. 1972); Hilliard v. Beto, 465 F.2d 829 (5th Cir.), petition for rehearing en banc granted, 465 F.2d 833 (5th Cir. 1972), en banc panel dissolved and case remanded to panel, 494 F.2d 34 (5th Cir.) remanded for evidentiary hearing, 494 F.2d 35 (5th Cir. 1974); United States v. Gonzalez-Hernandez, 481 F. 2d 650 (5th Cir. 1973). Compare Bryan v. United States, 492 F.2d 775 (5th Cir. 1974), and Frank v. United States 501 F.2d 173 (5th Cir. 1974).

Petitioners' authority from the Sixth Circuit, United States v. Davis, 319 F.2d 482 (6th Cir. 1963), was followed a scant two years later (even prior to Fontaine and Santobello) by Scott v. United States, 349 F.2d 641 (6th Cir. 1965). There the court held that affidavits filed by the government to counter the defendant's claim of plea inducement could not be regarded as conclusive; the court further remarked that it could not read the colloquy at sentencing as providing a definite rebuttal to petitioner's present claims of inducement. The case

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stands for the proposition that the Sixth Circuit does not automatically make the files and records conclusive.

As for the Tenth Circuit, the last cited by the petitioners as being in conflict with the Fourth on the issues involved herein, the authority cited is Putnam v. United States, 337 F.2d 313 (10th Cir. 1964). There the defendant, charged with transportation of a stolen motor vehicle from Canada to New Mexico, pled guilty and was sentenced to eighteen months. He alleged, in a motion to vacate his sentence under Section 2255, that he was induced to change his plea to guilty by the promises of, or a misunderstanding with, his court-appointed attorney to the effect that he would be deported to Canada but would not be imprisoned. In fact, the record in the case showed that he made a request in open court that any sentence be suspended because of his understanding that he would be immediately deported, but, held the court, the record also very clearly showed that it was only a request, and the trial court thoroughly inquired into whether defendant was in fact guilty and understood that he was. The court therefore held that no factual issues were raised by defendant's motion and that the files and records showed conclusively that his plea was entered voluntarily and knowingly. The case, aside from its age, is easily distinguishable from factual situations such as respondent's, who alleged an off-the-record plea bargain with the state.

Thus the supposed conflict among the circuits evaporates; the Fourth Circuit, in rendering the decision below, was following well-established authority, which was more thoroughly developed in respondent's brief to the Fourth Circuit. Petitioners have not cited, and respondent has been unable to find, any decision involving materially similar facts in conflict with the decision

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below.

II. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

Petitioners assert that the decision in respondent's favor conflicts with Machibroda v. United States, 368 U.S. 487 (1962); Townsend v. Sain, 372 U.S. 293 (1963); and Fontaine v. United States, 411 U.S. 213 (1973). The asserted conflict is difficult for respondent to perceive, since all three of the cited cases were decisions in favor of prisoners in habeas corpus actions. Machibroda affirmed the basic rule, which the court below followed, that a guilty plea induced by a promise of a certain minimum sentence is void, and the resulting conviction may be attacked collaterally in an evidentiary hearing. Townsend established the standards by which federal courts are guided in determining whether to grant an evidentiary hearing to state prisoners in habeas corpus, holding that a hearing must be held if the applicant did not receive a full and fair evidentiary hearing in a state court (which the respondent here did not). Fontaine stands for the proposition that a record showing compliance with Rule 11 is evidence of voluntariness, but is not conclusive, and that the existence of such a record is not a per se bar to collateral attack. The court held that the objective of Rule 11 is "to flush out and resolve all such issues, but like any procedural mechanism, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations." 411 U.S. at 215 (per curiam opinion).

Clearly the Fourth Circuit in the decision below was following, not defying, the law established by this Court, and manifestly its holding was correct.

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CONCLUSION

Petitioners have failed to demonstrate that the Fourth Circuit, because of its decision in this case, is "on the wrong side of the split in authority in the circuits," as they allege, or that the decision below is at variance with decisions of this Court. Indeed, respondent submits that the case is of little significance to anyone other than respondent himself, and it is not worthy of further attention by this Court. It is therefore respectfully suggested that the petition for certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this date served counsel for the opposing party in the foregoing matter with a copy of this Brief by
(X) by depositing in the United States Mail a copy of the same in a properly addressed envelope with adequate postage thereon.
( ) by delivering a copy of the same to the office or place of business of said counsel.

This the 25 day of June, 1976.

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